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IN THE

Supreme Court of the United States

No. 156 OCTOBER TERM—1950

DISTILLERS FACTORS CORPORATION,

Petitioner,

vs.

JOSEPH M. JACOBS, Receiver in Bankruptcy of Distillers Factors Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT WITH BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT WITH BRIEF IN SUPPORT THEREOF

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Distillers Factors Corporation, debtor in the above entitled proceeding, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, to review a judgment of that Court entered March 14, 1951, which affirmed an order of the District Court for the District of New Jersey dated the 10th of July, 1950 (42A). The order of the District Judge directed the dismissal of the debtor's petition for arrangement under Chapter XI of the Bankruptcy Act.

Opinions Below

The opinion of the Circuit Court of Appeals for the Third Circuit is reported at 187 F. (2d) 685.

The opinion of the United States District Court for the District of New Jersey is reported at 91 Fed. Supp. 796.

The opinion of the Referee in Bankruptcy who originally considered the matter is to be found in 26A-27A.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347) and Section 24(c) of the Bankruptcy Act (11 U. S. C., Sec. 47a).

United States Statutes Involved

The following provisions of the Bankruptcy Act are involved: Section 322 of Chapter ~~10~~ 11 of the Bankruptcy Act, U. S. C. Title 11, Chapter 11, which provides:

> "If no bankruptcy proceeding is pending, a debtor may file an original petition under this Chapter with the Court which would have jurisdiction of a petition for his adjudication."

Section 311 of Chapter 11 of the Bankruptcy Act, U. S. C. Title 11, Chapter 11, which provides:

> "When not inconsistent with the provisions of this Chapter, the Court in which the petition is filed shall, for the purposes of this Chapter, have exclusive jurisdiction of the debtor, and his property wherever located."

Section 2(a) 21 of the Bankruptcy Act, U. S. C. Title 11, Chapter 2, Section 11, the pertinent portion of which reads:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> "* * * (21) Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act, or where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required, except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy.* * *"

Section 376 of Chapter X of the Bankruptcy Act, U. S. C. Title 11, Chapter 11, which reads:

> "If an arrangement is withdrawn or abandoned prior to its acceptance or is not accepted at the meet-

ing of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited, or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

"* * * (2) Where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either a judging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

New Jersey Statute Involved

The New Jersey Corporation Act, of which the Court below took judicial notice the pertinent sections of which are involved in this proceeding, are in N. J. S. A. *viz*:

"14:14-3. Injunction and receiver; application to court of chancery.

"When any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor, or any stockholder who owns at least ten per cent of the capital stock of the corporation, may, by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for an injunction and the appointment of a receiver or receivers or trustees.

* * *

"If upon such inquiry it shall appear to the court that the corporation has become insolvent and is not

about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may enjoin the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its real or personal property whatsoever, except to a receiver appointed by the court, until the court shall otherwise order."

"14:14-9. Property, franchises, etc., to vest in receivers or trustees; insolvent foreign corporations.

"a. All the real and personal property of a corporation for which a receiver shall be appointed under the provisions of this chapter, wheresoever situated, and all its franchises, rights, privileges, credits and effects shall, upon the appointment of a receiver or trustee, or receivers or trustees, forthwith vest in him or them, and the corporation shall be divested of the title thereto.

"b. All the real and personal property of an insolvent foreign corporation, and all its franchises, rights, privileges, credits and effects, within the state shall, upon the appointment of a receiver or receivers, or trustee or trustees by the court of chancery of New Jersey, or other court of competent jurisdiction of this state, forthwith vest in him or them, and the corporation shall be divested of the title thereto."

"14:14-10. Reconveyance of property on payment of debts; dissolution.

"When a receiver has been appointed as aforesaid and it shall afterwards appear that the debts

of the corporation have been paid or provided for, and that there remains or can be obtained by further contribution sufficient capital to enable it to resume its business, the court of chancery may, in its discretion, a proper case being shown, direct the receiver to reconvey to the corporation all its property, franchises, rights and effects, and thereafter the corporation may resume control of and enjoy the same as fully as if the receiver had never been appointed.

"In every case in which the court of chancery shall not direct such reconveyance, it may, in its discretion, make a decree dissolving the corporation and declaring its charter forfeited and void."

"14:14-11. Examination of witnesses.

"The receiver may send for persons and papers and examine, on oath or affirmation, which oath or affirmation he may administer, any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, respecting its affairs and transactions, its real and personal property of every kind, its debts, credits, obligations, contracts and liabilities, and the claims against it.

"If any person shall refuse to be sworn or affirmed, or to answer the questions put to him, or refuse to declare the whole truth touching the subject matter of the examination, the court of chancery may, on report by the receiver, commit such person to prison, to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him."

"14:14-12. Power to search for and take possession of property.

"The receiver, with the assistance of a peace officer, may break open, in the daytime, any recep-

tacle, or any door, building or part thereof, or any other place of the corporation where any of its personal property whatever, books, papers or other writings or effects have usually been kept, or shall be, and take possession of the same and of the real estate belonging to the corporation."

"14:14-13. Inventory and report.

"The receiver, as soon as convenient, shall lay before the court of chancery a full and complete inventory of all the estate, property and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and make a report to the court of his proceedings every six months thereafter during the continuance of the trust."

"14:14-14. Limitation of time to present claims.

"The court of chancery may limit the time within which creditors shall present and make proof to the receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do, within the time limited, from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time."

"14:14-15. Presentation of claims; examination.

"Every claim against an insolvent corporation shall be presented to the receiver in writing and upon oath, and the claimant, if required, shall submit himself to such examination and produce such books and papers relating thereto as the receiver shall direct. The receiver may examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon the allow or disallow the same, or any part thereof, and notify the claimants of his determination."

"14:14-16. Trial of claim by jury.

"Any creditor or claimant who shall lay his claim before the receiver may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury. In either case such demand shall be entered on the minutes of the receiver, and thereupon an issue shall be made up between the parties, under the direction of one of the justices of the supreme court, and a jury impaneled, as in other cases, to try the same in the circuit court of the county in which the corporation carried on its business or had its principal office. * * *

"The creditor shall be considered, in all respects, as having proved his debt or claim for the amount so ascertained to be due, and in all cases in which no trial by jury shall be demanded the court of chancery shall have jurisdiction to pass upon the claims presented and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just."

"14:14-17. Appeal to court of chancery.

"Any person aggrieved by the proceedings or determination of the receiver in the discharge of his duty, may appeal to the court of chancery within thirty days after notice of such proceedings or determination, or such further time as the chancellor may allow. Such court shall summarily hear and determine the matter complained of and make such order touching the same as shall be equitable and just."

"14:14-18. Substitution of receiver as party to suits.

"The receiver shall, upon application by him, be substituted as party plaintiff or complainant in place of the corporation in any suit or proceeding at law or in equity pending at the time of his appointment."

"14:14-19. Action not to abate on death of receiver.

"No action against a receiver of a corporation shall abate by reason of his death, but upon suggestion of the facts on the record, shall be continued against his successor, or against the corporation if no new receiver is appointed."

"14:14-20. Sale of corporate property.

"Where property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or any other lien, the legality of which is questioned, and the property is of a character materially to deteriorate in value pending the litigation, the court of chancery may order the receiver to sell the same, clear of encumbrances, at public or private sale, for the best price that can be obtained, and pay the money into court, there to remain subject to the same liens and equities of all parties in interest as was the property before the sale, to be disposed of as the court shall direct."

"14:14-21. Laborers' and workmen's liens; priority of liens.

"In case of the insolvency of a corporation all persons doing labor or service of any character, in the regular employment of the corporation, shall have a lien upon its assets for the wages due them respectively for all labor, work and service performed within two months next preceding the date when insolvency proceedings shall be actually instituted against such insolvent corporation.

"Such lien shall be prior to all other liens that can or may be acquired upon the assets, except that of (1) a chattel mortgage recorded more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against the insolvent corporation, (2) a chattel mortgage for money loaned or for goods purchased within two months next preceding the date when

such proceedings in insolvency shall have been actually instituted, recorded within such period of two months, and (3) mortgages upon the real estate of the insolvent corporation."

"14:14-22. Compensation of receiver; expenses of administration.

"Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court of chancery shall allow a reasonable compensation to the receiver for his services and the costs and expenses of the administration of his trust, and the costs of the proceedings in the court, to be first paid out of the assets."

"14:14-23. Distribution of assets; priority of creditors.

"After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. The creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same.

"The surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, shall be divided and paid to the general stockholders proportionally, according to their respective shares."

"14:14-25. Effect of appointment of receiver on prior levies, judgments, attachments or other liens.

"All levies, judgments, attachments or other liens obtained through legal proceedings against a corporation at any time when the corporation shall be

insolvent, and within four months prior to the filing of a bill or petition against it for the appointment of a receiver under this chapter shall be deemed null and void in case a receiver shall be appointed by the court and the assets of such corporation distributed in such proceedings.

"The property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the receiver as a part of the estate of the corporation, unless the court shall order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, whereupon the same may pass to and shall be preserved by the receiver for the benefit of such estate.

"The court may order such conveyance as shall be necessary to carry the purpose of this section into effect, but nothing herein contained shall destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser for value who shall acquire the same without notice or reasonable cause for inquiry."

"14:14-26. Effect of appointment of receiver on subsequent levies, judgments, attachments or other liens.

"After the filing of a bill for the appointment of a receiver under the provisions of this chapter, if, as a result of such proceedings, a receiver is appointed and the assets of the corporation distributed in the proceedings, no lien or priority shall be obtained by levy, judgment, attachment or otherwise, and all attempted levies, judgments, attachments or other liens, by virtue of legal proceedings, shall be null and void as against the receiver."

"14:14-27. Title of receiver relates back.

"The title and right of a receiver appointed under the provisions of this chapter shall be held to

relate back to the time of the filing of the bill or petition, for the purpose of avoiding liens and preferences."

"14:14-30. Investigation by master.

"At any time after the institution of proceedings in the court of chancery designed for the purpose of securing the distribution of assets of a corporation among creditors or others entitled thereto, the court may, in addition to any remedies hereinbefore provided, upon application of any officer, stockholder, creditor, receiver, trustee or other interested party, appoint a master with full power to investigate the affairs and transactions of the corporation, its debts, obligations, contracts and liabilities and claims against it, and also the acts and conduct of any of its officers, agents, creditors or stockholders and the obligations and liabilities of any officer, agent, creditor, alleged debtor or stockholder."

"14:14-31. Powers of master.

"The master may send for persons and papers, and examine any persons, including the officers and agents of the corporation, creditors, claimants, debtors and stockholders on oath or affirmation, which he may administer, and if any person shall refuse to be sworn or to be affirmed, or shall refuse to answer such questions as shall be put to him, or shall refuse to declare the whole truth of the subject matter of the examination, the court of chancery may, on report by the master, commit such person to prison, there to remain until he shall submit himself to be examined and pay all costs of the proceedings against him.* * *"

"14:14-32. Interrogatories.

"The order designating the master and the hearings before him shall be made and had upon such notice, to such parties, as the court may, by order,

direct, and such parties, including the receiver or trustee, as the court may, by order, direct, shall be permitted to appear before the master and propound such interrogatories to any person examined as may be proper, and the master may propound such interrogatories and examine such books and papers as he considers proper."

"14:14-36. Reorganization by stockholders.

"When a majority in interest of the stockholders of a corporation, for which a receiver or trustee has been appointed, shall have agreed on a plan for the reorganization of the corporation and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court of chancery, upon the reconveyance to it of its property and franchises, mortgage the same for such amount as may be necessary for the purposes of the reorganization, and may issue bonds or other evidences of indebtedness or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization."

Statement of the Matter Involved

This petition challenges the correctness of a judgment of the Circuit Court of Appeals for the Third Circuit, which affirmed an order of the United States District Court for the District of New Jersey, dismissing a petition for arrangement under Chapter XI of the Bankruptcy Act, without notice. Petitioner was adjudged insolvent under the laws of the State of New Jersey on November 24, 1947, and a statutory receiver in insolvency had been appointed for it. Thereafter, it filed a petition for arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the District of New Jersey on December 8, 1949 (3A-7A). The debtor proposed to pay all its debts in full, and to the extent that it was in a position

to do so set forth its assets and liabilities in the schedules filed, together with the petition, supplemented by such information as is contained in the statement of affairs (8A-15A). The debtor's books, papers and records were in the possession of the State Court receiver from the time of his appointment, together with such property as passed into his custody. The debtor through its receiver in the arrangement proceeding attempted to obtain possession of its books, papers and records, in aid of the arrangement proposed (22A-23A). This relief was denied by the Referee (27A-28A), and upon review by the District Court that tribunal affirmed the Referee, and went beyond the scope of review and directed a dismissal of the Chapter XI proceeding in toto (42A). The appeal below challenged the correctness of that order.

Stated as succinctly as possible, the events which preceded the order complained of are as follows:

When the debtor, through the receiver appointed in the arrangement proceedings, sought to have its books, papers and records in aid of the arrangement turned over by the State Court receiver to the Federal Court receiver, the application was denied by the Referee (27A-28A). The order of the Referee was predicated upon a letter opinion (26A-27A) holding that Section 2a(21) of the Bankruptcy Act was applicable, and that the application should, therefore, be dismissed. The District Court on review not only affirmed the Referee, but went further and held that although it was clear that the New Jersey Corporation Act operates in the field occupied by the Bankruptcy Act, that, nevertheless, in the circumstances presented, the proceedings in the State Court under the New Jersey Corporation Act were not superseded by the proceedings under Chapter XI of the Bankruptcy Act; that retention of jurisdiction would be confusing and detrimental to the best in-

terests of the creditors and others involved in the proceedings, and directed further that the petition for arrangement under Chapter XI filed by the debtor be dismissed, no notice of which had theretofore been given to any of the parties in interest. The Court below upheld the District Court (38A-41A).

It is the contention of the debtor, petitioner here, that the Court below erred in denying to it, through its receiver in the arrangement proceedings, the right to the possession of its books, records, documents and papers relating to its affairs, in aid of the efforts to effect a plan of arrangement, and that a proper construction of the statutory provisions applicable to the case at bar justified and required supersession of the State Court proceedings by the proceedings under Chapter XI of the Bankruptcy Act. It is further contended that no warrant existed for the dismissal of the proceedings under Chapter XI, without the notice required by statute.

Questions Presented

1. Where a Chapter XI petition is filed, may the District Court divest itself of the exclusive jurisdiction it thus assumed, and dismiss the petition, without permitting the debtor a hearing on the plan and without giving notice to creditors, as provided for by Section 376(2) of the Bankruptcy Act?

2. Was the appointment of the State Court receiver of the debtor under a State insolvency law, tantamount to bankruptcy legislation, repugnant to the Bankruptcy Act, upon the advent of bankruptcy and, therefore, null and void?

3. Did the Court below err in holding that the State Court receiver for the debtor acting under a State in-

solvency law tantamount to bankruptcy legislation, had the right to retain and hold all of the debtor's property adversely to the receiver in the Chapter XI proceeding?

4. Did the Court below err in holding that Section 2a (21) of the Bankruptcy Act effectively barred supersession of the State Court proceedings, so as to deny to the debtor the benefits of Chapter XI of the Bankruptcy Act?

Reasons Relied Upon

1. The final decision in this cause is not limited to the Third Circuit, but is of national effect.

2. The decision of the Court below is in conflict with various decisions of this Court; viz.: *Emil* v. *Hanley,* 318 U. S. 515, 87 L. Ed. 954, 63 S. Ct. 687; *Straton* v. *New,* 283 U. S. 318, 51 S. Ct. 465, 75 L. Ed. 1060; *Stellwagen* v. *Clum,* 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507; *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318; *Carling* v. *Seymour* (C. C. A., 5th Cir.) 113 F. 483, cert. den. 186 U. S. 484, 22 S. Ct. 943, 46 L. Ed. 1261; *Engebretson* v. *Marcell* (C. C. A., 8th Cir.), 74 F. (2d) 93, cert. den. 299 U. S. 621.

3. The decision of the Court below is in conflict with numerous decisions of various Circuit and District Courts of the United States; viz.: *Weedman Stave Co.,* 199 F. 948 (D. C., Ark.); *Rutledge* v. *Bristol* (C. C. A., 5th Cir.), 65 F. (2d) 986; *Salmon & Salmon,* 143 F. 395 (D. C., Mo.); *In re Sage* (C. C. A., 8th Cir.), 224 F. 525, aff'd 236 F. 644; *In re International Coal Mining Co.* (D. C., Pa.) 143 F. 665, aff'd sub nom *Cresson & Clearfield Coal & Coke Co.* v. *Stauffer* (C. C. A., 3rd Cir.), 148 F. 981; *First National Bank in Albuquerque* v. *Robinson* (C. C. A., 10th Cir.), 107 F. (2d) 50; *Hammond* v. *Lyon Realty Co.* (C. C. A., 4th Cir.) 59 F. (2d) 592.

4. The construction, interpretation and effect given by the Court below to the New Jersey Corporation Act is in conflict with the construction, interpretation and effect given by the Circuit Court of Appeals for the Tenth Circuit in *First National Bank in Albuquerque* v. *Robinson, supra,* in which case that Court found and determined that a State insolvency law closely similar, if not substantially identical with the provisions of the New Jersey Corporation Act here involved, was superseded by the Federal Bankruptcy Act, and, therefore, a grave conflict exists which must be resolved for the guidance of the Courts and the public at large.

5. It is essential that Section 2a (21) of the Bankruptcy Act, and Section 376(2) of the Bankruptcy Act be uniformly interpreted and applied throughout the United States.

ARGUMENT

POINT I

A. The final decision in this cause is not limited to the Third Circuit, but is applicable to all other Federal Circuits.

B. The construction, interpretation and effect given to Section 2a (21) of the Bankruptcy Act by the Court below, and the refusal of the District Court to exercise control over the non-bankruptcy receiver was contrary to law.

There is an apparent conflict in the interpretation and effect of Section 2a (21) of the Bankruptcy Act as applied in the Third Circuit Court of Appeals, which dealt with the cause below, and the decisions of this Court and various Circuit Courts of Appeal which dealt with cases involving comparable questions.

This Court, in *Straton* v. *New, supra,* speaking through Mr. Justice Roberts, in referring to the contention of the appellees before the Court in that case, said:

> "They invoked the settled rule that state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and the winding up of his affairs similar to that provided by the National Act, are suspended while the latter remains in force, and proceedings under them are utterly null and void, whether commenced within four months of the filing of a petition in bankruptcy or before."

This rule and interpretation of the statute should have been applied to the case at bar by the Court below.

The generally accepted interpretation and effect of Section 2a (21) is concisely stated in *Collier on Bankruptcy,* 14th Ed., Vol. 4, p. 882, in the annotations to the analysis of Section 69d, which was also considered by Mr. Justice Douglas in *Emil* v. *Hanley, supra,* in construing Section 2a (21); and, the author of the text in *Collier's,* says:

> "Under Section 2a (21) the Bankruptcy Court has jurisdiction only over non-bankruptcy liquidation officers, and only where the proceeding or arrangement under which they are acting has been instituted within four months of bankruptcy, unless the proceeding was void under State law or was begun under a state statute which in effect is held to be a state insolvency law repugnant to the Bankruptcy Act."

Collier on Bankruptcy, 14th Ed., Vol. 1, p. 305, in referring to the nature or type of receivership which is superseded by bankruptcy, such as we contend existed here, states:

> "If, however, the receivership or trusteeship is initiated under a State statute which is in effect a State insolvency law tantamount to bankruptcy legislation, then such receivership will be superseded

by bankruptcy whether or not within the four-month limit prescribed by clause 21, as such proceedings are utterly null and void."

Citing *Straton* v. *New, supra*;

International Coal Mining Co., aff'd sub nom. *Cresson & Clearfield Coal & Coke Co.* v. *Stauffer, supra*;

First National Bank v. *Robinson, supra*;
and, other cases.

Section 2a (21) of the Bankruptcy Act is a new provision. It was added in 1938 by the Chandler Act, 52 Stat. 840, 11 U. S. C. 11a (21), and we contend that the correct interpretation and application of that provision necessarily rendered null and void the State Court receivership proceeding affecting Distillers Factors Corporation.

An examination of *First National Bank in Albuquerque* v. *Robinson, supra* (C. C. A., 10th Cir.), decided October 20, 1939, re-hearing denied November 29, 1939, in which case the Court followed *International Shoe Co.* v. *Pinkus, supra,* clearly demonstrates the error of the Court below; and, emphasizes the conflict of authority which manifestly exists, requiring final clarification and interpretation by this Court.

The Circuit Court of Appeals discussed the impact of bankruptcy upon the New Jersey statute hereinafter discussed, and said in passing, at page 62 of the record here:

> "Uncertainty has been introduced into this area of the law by indiscriminate language about 'state laws tantamount to bankruptcy.'"

The Court further said that it was not necessary to thoroughly analyze the meaning of those words. We submit that the language employed by the Courts heretofore has not been indiscriminate, and that the "uncertainty" which exists is the "uncertainty" which must be clarified.

POINT II

An analysis of the New Jersey Corporation Act (N. J. S. A. 14:14-3, *et seq.*) demonstrates clearly that it is a state insolvency law, subordinate to the national Bankruptcy Act. The failure of the Court below to so hold calls for a reversal of the determination below and a direction that the proper rule be applied.

The New Jersey statute under which the State Court receiver was appointed has been held to be essentially a bankruptcy act. The receivership in the State Court was, therefore, void as being in conflict with and repugnant to the Federal Bankruptcy Laws. It being clear that the state insolvency law is tantamount to bankruptcy legislation, with resultant nullification of the receivership thereunder, supersession arose out of the Chapter XI petition.

The District Court, whose determination was upheld by the Court below, made a comparison between the New Jersey Corporation Act and the Bankruptcy Act, and then expressed the view that "it has been said in some New Jersey decisions that the statute is essentially a bankruptcy act."

Butler v. *Commonwealth Tobacco Co.* (E. & A., 1908), 74 N. J. Eq. 423, 70 A. 319;
Bloch v. *Bell Furniture Co.* (E. & A., 1932), 111 N. J. Eq. 551, 162 A. 414;
Grobholz v. *Merdel Mortgage Investment Co.* (E. & A., 1934), 115 N. J. Eq. 411, 170 A. 815;
Bucsi v. *Longworth Bldg. & Loan Ass'n* (E. & A., 1937), 119 N. J. L. 120, 194 A. 857;
Nutz v. *Crone,* 189 N. J. Eq. 98.

In *Butler* v. *Commonwealth Tobacco Co., supra,* the New Jersey Court of Errors and Appeals, in the concluding

portion of the unanimous opinion, after making comparison between the Federal Bankruptcy Act and the State statutes said:

> "It is unnecessary, however, in this case to consider the general application of the bankrupt rule to all cases of insolvency. It is sufficient to say that the bankrupt character of our statute concerning insolvent corporations recognized so long vindicates the rule adopted in the earliest case and followed ever since."

In *Nutz* v. *Crone, supra,* the Court, speaking through the late Justice BODINE, formerly Federal District Judge for the District of New Jersey, also dealt with the same legal problem and said, at pp. 98-99 as follows:

> "As our Act has been held by the Courts of Errors and Appeals to be a Bankruptcy Act, and as it contains provisions certainly as broad as the Federal Bankruptcy Act, there is every reason why the decisions of the Federal courts should be followed. Uniformity in this regard is as desirable as it is in other cases where the State and Federal Courts exercise a concurrent or at least a very similar jurisdiction." Citing *Butler* v. *Commonwealth, supra.*

In *Grobholz* v. *Merdel* (E. & A.), *supra* 411, the nature and effect of the statute involved was further considered, and Mr. Justice PERSKIE, speaking for the same Court, following *Butler* v. *Commonwealth, supra,* and *Nutz* v. *Crone, supra,* said:

> "It is the settled law that in the decisions of questions arising in the administration of the assets of an insolvent corporation, the courts of this State have uniformly regarded our statute as essentially a bankrupt act and applied the doctrines which have controlled in bankruptcy proceedings."

Only one year prior to the enactment of the Chandler Act, in 1937, in *Bucsi* v. *Longworth, supra,* 194 A. 857, the Court of Errors and Appeals of New Jersey, through Chancellor CAMPBELL, said:

> "Our insolvency statute, Section 65 of the Corporation Act, is essentially bankrupt in character (*Bloch* v. *Bell Furniture Co.,* 111 N. J. E. 551, 561), and the object of the proceedings under the Act is to distribute assets of the debtor corporation (*Stockton* v. *Mechanics & Laborers Savings Bank,* 32 N. J. E. 163, 168, 169), and the matured creditors have right to payment at once."

The foregoing expressions of opinion by the New Jersey State Courts emphasize the force and effect of the New Jersey statute under which the State Court receiver was appointed for petitioner. We submit it is clear beyond doubt that the State insolvency law operates within the field occupied by the Bankruptcy Act. This having been demonstrated to the Court below, it was error for that tribunal to uphold the State Court receivership and to reject the claim that supersession flows from the fact that state insolvency laws which are tantamount to bankruptcy are superseded when bankruptcy occurs. *Straton* v. *New, supra.*

In *First National Bank in Albuquerque* v. *Robinson* (C. C. A. 10th Cir.), *supra,* PHILLIPS, *C. J.* details the successive sections of the New Mexico State insolvency act relating to corporations, the provisions of which are closely similar, if not substantially identical with the provisions of the New Jersey Corporation Act under which the State Court receiver was appointed for petitioner here. The Court in *First National Bank of Albuquerque* v. *Robinson, supra,* held the receivership proceeding to be void. A similar determination should have been made by the Court below in the case at bar.

Thus, not only does the decision below create confusion as to the applicable law, but, in addition, upsets what has heretofore been substantially the accepted rule applicable to comparable facts.

POINT III

The dismissal of the Chapter XI proceedings was contrary to law and in violation of Section 376(2) of Chapter XI of the Bankruptcy Act.

The District Judge whose ruling was upheld by the Circuit Court of Appeals below directed a dismissal of the Chapter XI petition filed by petitioner without notice either to the debtor or to the creditors. Section 376(2) of the Bankruptcy Act provides that an order of adjudication or dismissal cannot be granted ex parte, but can be made only "upon hearing after notice." The notice must be given "to the debtor, creditors, and such other persons as the Court may direct." Where there is a receiver, the Court should direct that notice be also given to him. The Court designates the time within which, and the form and manner of the notice to be given, since those matters are not otherwise specified in Section 376(2). *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 1386.

We refer to Section 315 of Chapter XI of the Bankruptcy Act, and also to the text of *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 202, where in the latter the following statement appears:

> "Where the Act requires notice, the parties are entitled to reasonable notice appropriate to the case and to a reasonable opportunity to be heard. Such reasonable notice and opportunity to be heard do not require that the process be served personally. Service by mail is sufficient and is expressly author-

ized by Section 392, and where the facts so warrant, service by publication would be equally appropriate."

In the instant case there was an absolute and total disregard of the requirements of the statute that notice be given of any application to dismiss the Chapter XI petition of the debtor. Indeed, such relief was not even sought by the appellee below. It was a gratuitous contribution by the District Judge, affirmed by the Court below, for which no warrant in law exists. The effect of the order of the District Judge dismissing the Chapter XI proceeding was to deprive the debtor of its constitutional right to endeavor to effect a plan of arrangement.

It is obvious from the opinion below that the Court gave consideration to the personal acts of officers of petitioner, unrelated to the affairs of petitioner (66A). We submit that the personal transgressions, if any, of individuals connected with the debtor cannot be lawfully visited upon the debtor, a separate entity.

We submit that it is important that it be determined uniformly as to the manner and the extent to which Section 376(2) of Chapter XI of the Bankruptcy Act should be applied.

Specification of Errors

The Court below erred:

1. In failing and refusing to hold that the State Court receivership of Distillers Factors Corporation was superseded by the filing of the petition for arrangement under Chapter XI of the Bankruptcy Act, and in construing and applying Section 2(a) 21 of the Bankruptcy Act accordingly.

2. In so construing and applying the cited sections of Chapter XI of the Bankruptcy Act so as to deny petitioner the right to have its petition for arrangement considered by its creditors in the manner provided for by statute.

3. In failing to direct the State Court receiver to turn over and deliver to the receiver appointed by the United States District Court for the District of New Jersey in the arrangement proceedings instituted by petitioner all of petitioner's books, papers and records, in aid of petitioner's efforts to effect a plan of arrangement under Chapter XI.

4. In failing to reverse the determination of the District Judge dismissing the petition for arrangement without notice.

CONCLUSION

It is respectfully submitted that a petition for writ of certiorari should be granted.

Dated: June 26, 1951.

ARCHIBALD PALMER AND MAX L. ROSENSTEIN,
Counsel for Petitioner.

Supreme Court, U.S.
FILED
JUL 28 1951
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1950.

DISTILLERS FACTORS CORPORATION, Debtor,
Petitioner,

vs.

JOSEPH M. JACOBS, as equity and Statutory Receiver of Distillers Factors Corporation,
Respondent.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF.

MORRIS M. SCHNITZER,
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Counterstatement of the Case.

The petitioner's Statement of the Matter Involved (p. 13) is incomplete in the following respects, supplied by excerpts from the opinion of the Court of Appeals below:

> "On November 27, 1947, a creditor filed against the appellant in a competent New Jersey court a complaint alleging, among other things, that the business of the appellant was dominated by its president, Harry J. Weiner, who, together with his wife and the company's bookkeeper, constituted its board of directors; that Weiner had been convicted of a federal crime and sentenced to six months imprisonment as a result of his administration of the corporation; that Weiner 'has in recent years been instrumental in organizing many corporations and has operated several of them in such a way that bankruptcy or receivership was the fate of said enterprises with great losses to the creditors'; that the affairs of this corporation had been so conducted as to cause it to become insolvent, and that the continuation of the course of operations would be prejudicial to the public and detrimental to creditors. After hearing, the court found that appellant was insolvent; that its business had been conducted to the prejudice and detriment of creditors and stockholders; and that the continuation of its course would be unsafe for the public and for those who had invested in it. Thereupon, the court enjoined further exercise of the corporate franchise and any action on behalf of the corporation by its officers or agents. In addition, the court appointed a statutory receiver and transferred title to all corporate property and assets to him with authority to administer and settle the affairs of the enterprise" (Transcript p. 60).

"The statutory receiver proceeded with his duties including the institution of legal proceedings to recover on certain claims. At the end of November 1949, his efforts were about to result in a recovery of $50,000 on an agreed settlement of litigation which he had instituted. However, a few days after judicial approval of the proposed settlement, the present petition for arrangement was filed in the district court by Harry J. Weiner as president of the appellant in its name and behalf. The petition revealed on its face that the petitioner lacked detailed information concerning the current status of the business, that the proposed arrangement was dependent on the realization of substantial sums from pending litigation, and that a purpose of the petitioner was to block the particular settlement then about to be consummated" (Transcript p. 61).

"The petition for arrangement was filed December 8, 1949, two years after the appointment of the New Jersey statutory receiver" (Transcript p. 62).

"But beyond such advertence to the general nature of the state proceeding, the specific complaint against the appellant in the state court and the action taken thereon are to be considered. It had been alleged under oath that Weiner, as president and controlling personality on the board of directors, dominated the corporation; that he had set up and wrecked other corporate enterprises; that a similar course was being pursued here; that Weiner had been convicted of a federal crime in the conduct of the company's affairs, and that the continuation of such control would not be in the public interest. While the findings of the New Jersey court are not detailed, they, together with the action taken, sufficiently indicate the conclusion of the New Jersey court that the complaint was well founded.

Now, two years after Weiner had been deprived of all participation in the affairs of the corporation, with a statutory receiver moving almost to the point

of realizing a substantial sum for the benefit of the corporation and with creditors apparently satisfied with the progress of litigation, Weiner, in the name of the corporation, has sought to invoke the procedure of voluntary arrangement under Chapter XI to frustrate the efforts in progress and to redirect the course of business administration in accordance with his present plans and proposals. To say, as appellant urges, that the district court should be required to let him do so, is to ignore both the history of the enterprise and the equitable character of the tribunal. In passing, it is to be noted that it is difficult to see how, after two years separation from the affairs of the corporation, Weiner would even have sufficient knowledge of the status of the business to make such a meaningful and considered proposal of arrangement as Chapter XI is designed to permit and encourage.

"We think these circumstances suffice to place the district court's dismissal within the area of permissible exercise of judicial discretion. And, although such discretion is exercised and reviewed in the light of the particular circumstances of the individual case, it is significant that in other cases, courts of bankruptcy have refused to permit persons who have wilfully misconducted a corporate enterprise to use a voluntary bankruptcy to create a situation apparently deemed more favorable to their interests than state receiverships already established" (Transcript p. 66).

Counterstatement of Questions Presented.

1. Does a petition for an arrangement under Chapter XI of the Bankruptcy Act, filed more than four months after the appointment of an equity and statutory receiver for a domestic corporation by a state court, supersede and displace the state receiver and all action and proceedings of the state court during the two years of its administration?

2. May a district court, upon its own motion, dismiss a petition for an arrangement under Chapter XI of the Bankruptcy Act, in order to prevent persons who have wilfully misconducted the corporate enterprise, from restoring their authority and influence in management, and after a finding that a state court receiver has had title to all assets and property of the debtor for more than two years so that retention of Federal jurisdiction would be confusing and detrimental to the creditors and not in the public interest.

3. Is the New Jersey Corporation Act, adopted in 1829, a valid state regulation and limitation upon the exercise of state corporate charters.

Answer to Petitioner's Statement of Reasons for Allowance of the Writ of Certiorari.

1. The decisions below construe and apply the New Jersey Corporation act in a manner consistent with every prior, authoritative interpretations of the same statute by the higher state courts. *Gallagher* v. *Asphalt Co. of America*, 65 N. J. Eq. 258, 55 Atl. 259 (Ch., 1903); *Singer* v. *National Bedstead Manufacturing Company*, 65 N. J. Eq. 290, 55 Atl. 868 (Ch., 1903); *Pearce* v. *Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 319 (Ch., 1904); *Laredef Corporation* v. *Federal Seaboard Terra Cotta Corporation*, 131 N. J. Eq. 368, 25 A. (2d) 433 (Ch., 1942).

2. The decision of the court below is in harmony with every related decision of this court and particularly *Emil* v. *Hanley*, 318 U. S. 515, 63 Sup. Ct. Rep. 687, 87 L. ed. 954 (1943); *Yoshinuma* v. *Oberdorfer Ins. Agency*, 136 F. (2d)

460 (C. C. A. 5th, 1943), cert. den., 320 U. S. 785, 64 Sup. Ct. Rep. 189, 88 L. ed. 472 (1943).

3. The decision of the court below is in accord with other decisions of other Federal courts. *Atlanta Flooring & Insulation Co.* v. *Oberdorfer Ins. Agency,* 136 F. (2d) 457 (C. C. A. 5th, 1943; *Engebretson* v. *Marcell,* 84 F. (2d) 315, (C. C. A. 8th, 1936), cert. den., 299 U. S. 566, 57 Sup. Ct. Rep. 28, 81 L. ed. 417, rehearing den. 299 U. S. 621, 57 Sup. Ct. Rep. 114, 81 L. ed. 457; *In re Kings, P. C. Inc.,* 26 F. Supp. 426 (D. C. E. D. N. Y., 1939); *In re Schwartz Brothers, Inc.,* 58 F. Supp. 761 (D. C. Minn., 1945); *Yoshinuma* v. *Oberdorfer Ins. Agency,* 136 F. (2d) 460 (C. C. A. 5th, 1943), cert. den., 320 U. S. 785, 64 Sup. Ct. Rep. 189, 88 L. ed. 472 (1943).

4. Petitioner conceded in the court below (Transcript p. 62) that the New Jersey Corporation Act, unlike the New Mexico statute construed in the *First National Bank in Albuquerque* v. *Robinson,* 107 F. (2d) 50 (C. C. A. 10th, 1939), is not void and that proceedings under it are legally effective. Accordingly, there was no occasion for the court below to pass upon, nor did it decide the question considered in *First National Bank in Albuquerque* v. *Robinson, supra.*

5. Section 2 (a) 21 of the Bankruptcy Act was construed by this court in *Emil* v. *Hanley, supra,* which was followed and applied by the court below.

ARGUMENT.

I.

A petition for an arrangement under Chapter XI of the Bankruptcy Act does not supersede or displace a receiver appointed by a state court more than four months prior to the Federal proceeding.

Petitioner's argument (p. 17 *et seq.*) is that a petition for arrangement under Chapter XI of the Bankruptcy Act authoritatively supersedes any state court proceeding whether or not more than four months old. This court held otherwise in construing section 2 (a) 21 of the Bankruptcy Act, in *Emil* v. *Hanley, supra.* No case supports the petitioner's interpretation of Chapter XI of the Bankruptcy Act. On the same point the court below said: "The language of Section 2 (a) 21 leaves little doubt that a non-bankruptcy receivership valid in its inception and of more than four months' duration, whatever its character, is to be tolerated where the federal relief sought is an arrangement" (Transcript p. 63).

II.

A Chapter XI proceeding may be dismissed by the court upon its own motion.

The District Court in dismissing the Chapter XI proceeding said "retention of jurisdiction under these circumstances would be confusing and detrimental to the best interest of creditors and others involved in the proceedings" (Transcript p. 41a). The Court of Appeals in affirming that result said:

> "We think these circumstances suffice to place the district court's dismissal within the area of per-

missible exercise of judicial discretion. And, although such discretion is exercised and reviewed in the light of the particular circumstances of the individual case, it is significant that in other cases, courts of bankruptcy have refused to permit persons who have wilfully misconducted a corporate enterprise to use voluntary bankruptcy to create a situation apparently deemed more favorable to their interests than state receiverships already established. Such considerations must be particularly persuasive where the petition seeks a Chapter XI arrangement in which the initiative and influence of management are likely to be more substantial and judicial control less detailed than in bankruptcy proceedings under other chapters'' (Transcript p. 66).

The petitioner argues (p. 23 *et seq.*) that regardless of the controlling equities, the public interest or the rights of creditors, the court is powerless to dismiss a Chapter XI proceeding except upon a formal motion by a party. No case so holds and none is cited. This court reached the opposite conclusion in *Securities and Exchange Commission* v. *United States Realty Improvement Company,* 310 U. S. 434, 84 L. ed. 1293 (1940), and that decision was relied upon and applied by the court below.

III.

The New Jersey Corporation Act, adopted in 1829, is a valid regulation and limitation upon the exercise of state corporate charters.

Petitioner argues that the New Jersey Corporation Act, N. J. S. A. 14:14-3 *et seq.,* is a Bankruptcy Act in conflict with Federal legislation upon the same subject and therefore wholly void.

The history, language and purpose of the state statute repudiates the plaintiff's claim. The difference between the state statute and a bankruptcy law is the distance between life and death. The Federal statute aims at the rehabilitation of a debtor. The state law protects the public by forfeiting the corporate charter. Neither result can be accomplished equitably without administration of assets and distribution among creditors, which is therefore required by both statutes. But no process of reasoning can transform a resemblance between medicine and embalming fluid into proof that they are one and the same thing, identical in character, function and consequences.

In *Singer* v. *National Bedstead Manufacturing Company,* 65 N. J. Eq. 290 at 296, 55 Atl. 868 at 870 (Ch., 1903), Vice-Chancellor Stevenson, comparing the state and federal statutes, said:

> "Our legislation does not provide merely a creditors' suit for the sequestration of the assets of insolvent corporations. The direct object of the suit is to place the corporation under disabilities by an injunction which prevents it from exercising its franchises. The Bankrupt act does not undertake to touch the life of the corporation or its permanent capacity to exercises its franchises. It deals wholly with the assets of the corporation. After the bankrupt court has stripped a corporation of its assets, the corporation is amenable to proceedings under our state statute to have it disabled and then dissolved. Our state statute plainly remains at all times in full force for the purpose of affording stockholders as well as creditors the remedy of this statutory injunction, and not only the rights of stockholders, but the safety of the public also, must be recognized and cared for in our statutory suit. Is it possible that any mind can be so astute as to discover in any of the language of the Bankrupt act an intent that after the court of

> chancery of New Jersey, under the statute of the state, has disabled one of its corporations from the exercise of its franchises by an injunction in pursuance of the policy of the state, there must be no sequestration of the assets of the corporation by a receiver for the equal benefit of all the creditors, even though the bankrupt court has no jurisdiction to grant the creditors such relief? The mischief of such a supposed situation are numerous and manifest."

See accord, as to the origin, character and function of the state law, *Gallagher* v. *Asphalt Co. of America,* 65 N. J. Eq. 258, 55 Atl. 259 (Ch., 1903), 67 N. J. Eq. 441, 58 Atl. 403 (Ch., 1904).

While there is no substance in petitioner's argument, that the New Jersey Corporation Act is a void bankruptcy statute, that claim is barred by petitioner's concession below. As the Court of Appeals noted in its opinion "in his reply brief, appellant (petitioner in this court) concedes that the claimed infirmity is not such as to make the New Jersey statute void and that proceedings under it are legally effective, at least until bankruptcy proceedings are instituted" (Transcript p. 62). Petitioner cannot be heard in this court on claims which were expressly abandoned and not decided in the court below. *Helvering* v. *Wood,* 309 U. S. 344, at 348-349, 60 Sup. Ct. Rep. 551, 84 L. ed. 796; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, at 498, 57 Sup. Ct. Rep. 569, 81 L. ed. 755.

CONCLUSION.

It is respectfully submitted that a petition for a writ of certiorari should be denied.

MORRIS M. SCHNITZER,
Counsel for Respondent.